No. 00-1077

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL, ET AL.,
CROSS-PETITIONERS

v.

HUMANITARIAN LAW PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE CROSS-PETITIONERS

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TABLE OF AUTHORITIES

Cases:

Constitution, statutes and rule:

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1. As the government's conditional cross-petition for certiorari explains (at 6-11), the court of appeals erred in sustaining the district court's grant of injunctive relief barring enforcement against respondents and their members of two provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA or the Act), Pub. L. No. 104-132, 110 Stat. 1214. Under Rule 13.4 of the Rules of this Court, the government's conditional cross-petition for certiorari in this case "will not be granted unless another party's timely petition for a writ of certiorari is granted." In opposing the government's conditional cross-petition, the cross-respondents are therefore necessarily arguing that this Court should not consider the propriety of AEDPA's ban on the provision of "personnel" and "training" to designated foreign terrorist organizations *even if* the

Court elects to review the court of appeals' holding that the Act's prohibition of other forms of "material support or resources" to such organizations is constitutional. Cross-respondents make no effort to defend that proposition explicitly, however. If the Court does grant certiorari in this case, we see no justification for limiting its review to those portions of the court of appeals' ruling that are favorable to the government—particularly since to do so would leave in place the district court's preliminary injunction barring enforcement against cross-respondents and their members of provisions of an Act of Congress.

2. As the cross-petition for certiorari explains (at 7-8), AEDPA's ban on the provision of "personnel" to designated foreign terrorist organizations covers situations in which individuals have submitted themselves to the organization's direction or control, but does not restrict independent advocacy of the organization's interests or agenda. Although cross-respondents offer the conclusory assertion that "this construction lacks any support in the language of AEDPA" (Br. in Opp. 8), in fact our reading comports with dictionary definitions of the statutory term "personnel." See Cross-Pet. 7. Indeed, cross-respondents provide no authority for their suggestion that independent advocacy to the public that is supportive of a designated foreign terrorist organization would naturally be characterized as providing "personnel" to the organization itself. See 18 U.S.C. 2339A(b), 2339B(a)(1) (Supp. IV 1998).

Cross-respondents also assert (Br. in Opp. 9) that "the government's proposed narrowing construction is at odds with the purported rationale for AEDPA's prohibitions on the provision of material support to designated organizations, namely that all support must be prohibited because any support may free up a

designated organization's resources for terrorist activities." It may well be true that even independent advocacy in support of a foreign terrorist organization might in some circumstances assist the group in the sense of enabling it to divert resources to violent acts —although if the advocacy was truly independent, there is far less reason to suppose that it would substitute for advocacy that would be undertaken by the foreign terrorist organization itself. But however that may be, Congress can scarcely be faulted for seeking to combat terrorist activity in a way that does not trench upon the core First Amendment freedom of a United States citizen to express his own views upon matters of public concern. And it is perverse to suggest that because our straightforward construction of the prohibition against providing "personnel" to a designated foreign terrorist organization would not address harm that might result from independent advocacy to the public at large, the provision should be interpreted more broadly *and then declared unconstitutional*.

Cross-respondents also contend that AEDPA's ban on the provision of "personnel" to designated foreign terrorist organizations is unconstitutional even as applied to some situations in which an individual submits himself to the organization's direction or control. Cross-respondents assert (without citation to authority) that "[a]ctivities such as writing, speaking, and distributing literature are still protected under the First Amendment even when done under the direction or control of a foreign organization." Br. in Opp. 8 n.6. An individual who has agreed to subordinate his own views to those of a foreign terrorist organization, however, has a substantially reduced First Amendment interest in unrestricted communication of the group's message (as compared to an individual engaged in inde-

pendent expression of support for the organization's goals or methods). See Cross-Pet. 8.[1] The AEDPA "personnel" ban is therefore constitutional even as applied to services that involve communication. But even if AEDPA's application to some such conduct were thought to raise substantial constitutional con-

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[1] Contrary to cross-respondents' contention (Br. in Opp. 8-9), the court of appeals' decision in *Palestine Information Office* v. *Shultz*, 853 F.2d 932 (D.C. Cir. 1988), provides significant support for the government's position in this case. In upholding a State Department order closing the Washington, D.C., office of the Palestine Liberation Organization (PLO), the court of appeals explained:

> The associational interest of appellants is minimal to non-existent. The order does not prevent them from associating with any individual or group of individuals. It does not even prevent them from "associating" with the PLO in the normal sense of that word. It does not, for example, bar them from speaking with members of the PLO. It simply prevents them from acting as the organization's foreign mission. No court has ever found in the right to freedom of association a right to *represent* a foreign entity on American soil. The cases cited by appellants for this proposition are inapposite because, arising in the domestic context, they do not speak to the crucial issue of representation of foreign entities.

Id. at 941. Similarly here, AEDPA's "personnel" ban does not prevent cross-respondents from "associating" with any designated foreign terrorist organization, in the sense of speaking with the organization's members. Cross-respondents have no First Amendment right, however, to act as the agents of such a group. Equally pertinent is the court of appeals' observation in *Palestine Information Office* that "[e]ven if the appellants did have some minimal free association right that was infringed upon by the order, this court would be compelled to consider the strong interest of the government in defending the country against foreign encroachments and dangers." *Id.* at 941-942 (internal quotation marks omitted); see also *id.* at 939-940 (rejecting free speech claims).

cerns, there would be no basis for facial invalidation of the "personnel" ban. See *id.* at 8-9.

3. AEDPA's ban on the provision of "training" to designated foreign terrorist organizations is subject to a similar analysis. Cross-respondents assume that "training in human rights advocacy, peacemaking, kindergarten teaching, health services, or daycare provision" (Br. in Opp. 10) is fully protected by the First Amendment. We may assume, *arguendo*, that in other contexts, a prohibition on the provision of training in those fields could impose an impermissible burden on First Amendment freedoms. But where the recipient of assistance has been designated by the Secretary of State as a foreign terrorist organization, the individual's desire to engage in this particular form of association may be forced to give way to the government's compelling foreign policy and national security interests.

As the cross-petition explains (at 10), support of a designated foreign terrorist organization through "training," like the provision of cash or goods, may enable the organization to divert other resources to violent activities. Indeed, even training in seemingly innocuous activities may directly facilitate terrorist conduct. For example, training in how to drive a car or navigate a boat may enable the trainee to drive a car bomb into a United States embassy or commit a similar violent act against a United States vessel.

In any event, the "training" ban is indisputably valid as applied to such activities as the use of weapons or the construction of bombs. See Cross-Pet. 10. Cross-respondents contend that if the "training" prohibition is invalid in some of its applications, it is subject to facial invalidation on vagueness grounds, on the theory that "one simply cannot know what types of 'training' are

permitted and what types are proscribed." Br. in Opp. 10. That argument lacks merit. The "training" ban unambiguously covers instruction in weapons use or bomb-making, and therefore gives ample warning that training in those areas is proscribed.[2]

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For the reasons stated above and the reasons stated in the conditional cross-petition for a writ of certiorari, if the petition for a writ of certiorari in No. 00-910 is granted, the cross-petition should also be granted. If

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[2] As a matter of statutory construction, there is no basis for cross-respondents' assertion (Br. in Opp. 10) that "one simply cannot know what types of 'training' are permitted and what types are proscribed." AEDPA unequivocally prohibits persons within the United States or subject to its jurisdiction from providing *any* form of "training" to designated foreign terrorist organizations. Cross-respondents seem to argue that the effective reach of the Act is unclear because some of its applications may be unconstitutional. Cross-respondents cite no authority, however, suggesting that a statute may be deemed impermissibly vague (and therefore subject to facial invalidation) simply because particular applications of the law raise close constitutional questions.

Rather, cross-respondents' contention that the "training" ban is invalid in all its applications because it is invalid in some is properly analyzed as an overbreadth rather than a vagueness challenge. But even in a First Amendment challenge, "[o]nly a statute that is substantially overbroad may be invalidated on its face." *Houston* v. *Hill*, 482 U.S. 451, 458 (1987); see also, *e.g.*, *NEA* v. *Finley*, 524 U.S. 569, 580 (1998) (facial invalidation "has been employed by the Court sparingly and only as a last resort") (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)). As the cross-petition explains (at 10-11), AEDPA's "training" ban is constitutional in the vast majority of its intended applications; possible constitutional infirmities in isolated applications of the statute provide no basis for the injunction entered by the district court in this case.

the Court denies the petition in No. 00-910, the cross-petition should be denied.

Respectfully submitted.

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